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No. 09-1485

In the Supreme Court of the United States

AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's republication of 1994 rules to change section numbers, simplify language, and make two targeted changes in response to a new statute reopened the rules to judicial review in their entirety.

2. Whether a motion to dismiss for mootness filed by the government in a previous case collaterally estopped the government from contesting the court of appeals' jurisdiction in this case.

3. Whether the court of appeals correctly determined that it lacked jurisdiction because petitioner contended that its petition to rescind longstanding regulations was "based solely on grounds arising after" the original period for judicial review but failed to file its petition "within sixty days after such grounds ar[o]se." 42 U.S.C. 7607(b)(1) (Supp. II 2008).

4. Whether the court of appeals had jurisdiction under the All Writs Act, 28 U.S.C. 1651(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 588 F.3d 1109. The decision of the Environmental Protection Agency (Pet. App. 22a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2009. A petition for rehearing was denied on March 5, 2010 (Pet. App. 16a, 17a). The petition for a writ of certiorari was filed on June 3, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 213 of the Clean Air Act (CAA or Act), 42 U.S.C. 7547, authorizes the Environmental Protection Agency (EPA) to promulgate emission standards for "new nonroad engines." 42 U.S.C. 7547(a)(3). The term "nonroad engines" describes a wide variety of mobile, non-highway engines, including engines used in tractors, lawnmowers, construction equipment, and locomotives. See 40 C.F.R. 85.1602 (2008); 40 C.F.R. 89.1 (2008)[1]; see generally *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1080-1082 (D.C. Cir. 1996) (*EMA*) (discussing 1990 CAA amendments, which gave EPA authority over nonroad engines).

Section 209 of the CAA, 42 U.S.C. 7543, preempts many state regulations pertaining to nonroad engines. States may not adopt "any standard or other requirement relating to the control of emissions" from new locomotive engines or from new engines of less than 175 horsepower that are used in construction or farm equipment. 42 U.S.C. 7543(e)(1). The CAA establishes a different preemption regime for all other nonroad engines. Subject to EPA approval, California may adopt its own standards for such engines, 42 U.S.C. 7543(e)(2)(A), and other States may then adopt and enforce provisions identical to California's as their own, 42 U.S.C. 7543(e)(2)(B). For any type of nonroad engine, a state regulation is not preempted if it is not a "standard" or an "implementation and enforcement" provision relating

[1] Several of the regulations discussed in this brief were recently recodified and given new section numbers. For consistency with the prior proceedings in this case, this brief will cite to the 2008 version of the regulations.

to the "control of emissions." See 42 U.S.C. 7543(e); *EMA*, 88 F.3d at 1094.

2. In 1994, EPA completed two rulemaking proceedings related to nonroad engine emissions. See Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts, 59 Fed. Reg. 31,306 (1994); Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969 (1994); see also 42 U.S.C. 7547(a) (governing EPA rulemaking authority for nonroad engine emissions); 42 U.S.C. 7543(e) (directing EPA to issue regulations governing preemption provisions). In one of the resulting rules, EPA defined the scope of the statutory term "new nonroad engines." 42 U.S.C. 7547(a)(3). Under EPA's definition, engines are considered "new" until they are either placed into service or sold to an ultimate purchaser. 40 C.F.R. 85.1602; see 59 Fed. Reg. at 31,328-31,331 (explaining definition); *id.* at 36,971-36,974. In addition, in rules that essentially track the language of the statute, EPA distinguished the types of "new" engines for which States may never promulgate "standard[s] or other requirement[s] relating to the control of emissions" under 42 U.S.C. 7543(e)(1) from those for which they may promulgate such requirements if they adopt EPA-approved California rules under 42 U.S.C. 7543(e)(2). See 40 C.F.R. 85.1603-85.1606; see also 59 Fed. Reg. at 36,986-36,987.

EPA also adopted an interpretive rule, which was readopted in 1997, stating in relevant part that:

> EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur lim-

> its on fuel; nor are permits regulating such operations precluded, once the engine is no longer new.

59 Fed. Reg. at 31,339 (now codified at 40 C.F.R. Pt. 89, Subpt. A, App. A (2008)) (App. A)[2]; see Control of Air Pollution: Emission Standards For New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts; Preemption of State Regulation for Nonroad Engine and Vehicle Standards; Amendments to Rules, 62 Fed. Reg. 67,733 (1997). In EPA's view, such in-use regulations are not "standard[s] or other requirement[s] relating to the control of emissions" and therefore are not subject to preemption under either 42 U.S.C. 7543(e)(1) or 7543(e)(2). The D.C. Circuit affirmed EPA's interpretation of the statutory provisions in relevant part. See *EMA*, 88 F.3d at 1093-1094.

3. On July 12, 2002, more than eight years after EPA had issued these rules, petitioner asked the agency to commence a new rulemaking to amend or repeal them. Raising a number of arguments that the D.C. Circuit had previously rejected in *EMA*, see, *e.g.*, Pet. App. 66a, petitioner asked EPA to preempt "state and local requirements 'that impose in-use and operational controls or fleet-wide purchase, sale or use standards on nonroad engines.'" *Id.* at 22a.

In March 2006, petitioner filed a petition for review in the D.C. Circuit, contending that EPA had either constructively denied its rulemaking petition or had unreasonably delayed action on it. Pet. App. 112a. EPA later

[2] The interpretive rule goes on to state: "EPA believes that states are precluded from requiring retrofitting of used nonroad engines except that states are permitted to adopt and enforce any such retrofitting requirements identical to California requirements which have been authorized by EPA under [42 U.S.C. 7543]." App. A.

announced its intention to grant or deny the petition in the context of a larger rulemaking concerning nonroad engines. See *id.* at 20a-21a. At the same time, EPA made clear that it was "not proposing to adopt the explicit changes requested by [petitioner] in its petition." *Id.* at 20a. The D.C. Circuit then dismissed petitioner's petition for review as moot. *Id.* at 115a.

After receiving comments in response to petitioner's rulemaking request, EPA denied it. Pet. App. 22a-87a, 89a-91a. First, the agency concluded that its "regulations as written are sufficient and need not be revised to address specifically" petitioner's arguments about state prescription of "fleet" emissions. *Id.* at 23a; see *id.* at 26a ("[W]e do not believe any change in regulations is necessary. The current regulations preempt state and local standards related to the control of emissions from nonroad engines. This general language would include emission standards regulating fleets as well as individual engines or equipment."). Second, EPA rejected petitioner's request that it preempt state regulations imposing use and operational controls, stating that its prior interpretation of the statute on this point, as affirmed by the D.C. Circuit, was correct. *Id.* at 23a; see *id.* at 59a-84a. EPA separately "reorganiz[ed] the regulatory language related to preemption of state standards" as part of a larger effort "to write its regulations in plain language format." *Id.* at 88a-89a.

4. Petitioner filed a petition for review in the court of appeals, which dismissed the petition as time-barred under Section 307(b)(1) of the CAA, 42 U.S.C. 7607(b)(1) (Supp. II 2008). See Pet. App. 1a-14a. The court explained that the Act requires petitions for review of any "nationally applicable regulations" to be brought within 60 days after their promulgation, unless the petition is

based "solely on grounds arising after such sixtieth day," in which case it must be brought within 60 days after the date on which those new grounds arose. *Id.* at 5a-6a (quoting 42 U.S.C. 7607(b)(1) (Supp. II 2008)).

When a particular statute does not specifically address the circumstances under which newly-arising events will provide a basis for judicial review, the D.C. Circuit has found that "agency denial of a petition for a new rulemaking which complains of substantive infirmities in existing rules is, for the most part, judicially reviewable irrespective of time limits dating from the rules' enactment." Pet. App. 6a (emphasis omitted). The court of appeals explained, however, that judicial-review provisions like the one in the CAA warrant different treatment because they demonstrate that "Congress has 'specifically address[ed] the consequences of failure to bring a challenge within the statutory period.'" *Id.* at 7a (quoting *National Mining Ass'n* v. *Department of the Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995)). Accordingly, under such a provision, review of rules after the expiration of the original 60-day period is permitted only under the circumstances identified in the statute. *Id.* at 7a-8a. The court explained that the CAA's judicial-review provision "imposes one additional constraint on petitions brought outside the original 60-day window based on after-arising grounds: they must be filed within 60 days of the new event, rather than any time after it." *Id.* at 8a.

Petitioner contended that its petition was timely because its claims did not ripen until after the closing of the original 60-day window for review. Pet. App. 9a. The court of appeals held that, even assuming petitioner's challenge was based on grounds that post-dated the original promulgation of the EPA rules, the chal-

lenge was nevertheless untimely because petitioner had identified no triggering event that had taken place during the 60 days before the filing of its petitions with either the EPA or the court of appeals. *Id.* at 10a. The court of appeals found it unnecessary to determine whether a party that asserts a later-arising ground for review is required to file first with the EPA or with the court of appeals, since petitioner's challenge was untimely under either approach. *Id.* at 11a.

The court of appeals also rejected petitioner's contention that EPA had "reopened" the rules it was challenging and had thereby triggered a new 60-day period for judicial review. Pet. App. 11a-13a. The court found that EPA "gave no 'indication that [it] had undertaken a serious, substantive reconsideration'" of the regulations that petitioner challenged. *Id.* at 13a. Instead, EPA had effectively sought comment on whether it should reopen the regulations and had ultimately decided not to do so. *Ibid.*

5. Petitioner's request for rehearing en banc was denied, with no member of the court of appeals requesting a vote. Pet. App. 17a.

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to consider petitioner's challenge to EPA's 1994 rules because EPA had not reopened its earlier rules to judicial review and petitioner had identified no new "grounds [for review] arising" within the 60 days preceding petitioner's filings. The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends that the court of appeals had jurisdiction to review its claim because EPA's "re-prom-

ulgat[ion]" of its "entire" set of preemption rules reopened every aspect of those rules to renewed challenge. Pet. 14, 25-28. That factbound contention lacks merit and raises no legal issue of recurring importance.

Under the D.C. Circuit's "well established" reopening doctrine, when an agency proceeding "explicitly or implicitly shows that the agency actually reconsidered" a previous rule, "the matter has been reopened and the time period for seeking judicial review begins anew." *National Ass'n of Reversionary Prop. Owners* v. *Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998) (*NARPO*). When the agency has "opened the issue up anew, * * * its renewed adherence [to the rule] is substantively reviewable." *Ibid.* (quoting *Public Citizen* v. *NRC*, 901 F.2d 147, 150 (D.C. Cir.), cert. denied, 498 U.S. 992 (1990)). In order "[t]o determine whether an agency reconsidered a previously decided matter, thus triggering the reopening doctrine, a court 'must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency.'" *Ibid.* (quoting *Public Citizen*, 901 F.2d at 150).

In this case, the court of appeals examined "the entire context of the rulemaking" and correctly concluded that "EPA did not reopen consideration of the regulations [petitioner] asked it to review." Pet. App. 12a (quoting *NARPO*, 158 F.3d at 141); see *id.* at 11a-13a. In the notice of proposed rulemaking, EPA explained that it was proposing to transfer its preemption regulations to a new part of the Code of Federal Regulations and to simplify them "as part of EPA's ongoing effort to write its regulations in plain language." *Id.* at 19a. The agency stressed that "[t]he proposed regulations are based directly on the existing regulations" and that, "[w]ith the exception of the simplification of the lan-

guage and specific changes described in this section, we are not changing the meaning of these regulations." *Ibid.*[3]

When issuing its final rule, the agency reiterated the limited scope of the proceeding and explained that its revisions were intended only to simplify the language of the rules and to make the two targeted changes required by a 2004 statute. Pet. App. 89a. Although EPA "address[ed] feedback from [petitioner] and others," it gave no indication that it was deviating from its original plan (to limit itself to recodifying the rules, simplifying their language, and responding to the recent statute) by "undertak[ing] a serious, substantive reconsideration" of the rules in question. *Id.* at 13a (citation omitted).[4]

2. Petitioner contends that EPA was collaterally estopped from denying that it had reopened its preemption rules because of the position the agency took in a motion to dismiss as moot petitioner's previous unreasonable-delay petition. Petitioner further argues that the court of appeals' prior decision granting EPA's

[3] The two "specific changes described in this section" were EPA's proposal to implement a 2004 statute by adding provisions related to "spark ignition engines smaller than 50 horsepower," and "criteria for EPA's consideration in authorizing California to adopt and enforce standards applicable to such engines." Pet. App. 19a-20a.

[4] Even if the mere transfer of existing rules to a new section of the Code of Federal Regulations could render them subject to renewed judicial review in their entirety, the petition in this case would still be untimely in part because the EPA interpretive rule on "use and operation" that is among those petitioner seeks to challenge was not transferred or otherwise repromulgated. EPA transferred other preemption rules from 40 C.F.R. Part 85, Subpart Q to 40 C.F.R. Part 1074 (2009), see Pet. App. 89a, but the interpretive rule remained as Appendix A to 40 C.F.R. Part 89, Subpart A. See 40 C.F.R. Pt. 89, Subpt. A, App. A (2009).

motion to dismiss compelled the court to find in this case that the challenged regulations had been reopened. Pet. 28-30. Those arguments lack merit.

As the court of appeals noted, EPA had moved to dismiss petitioner's previous unreasonable delay claim as moot because "the agency had commenced a rulemaking on the issues [petitioner] raised." Pet. App. 13a (quotation marks and citation omitted). Petitioner contended in this case that "this language amounts to a concession by EPA that it was reopening the rules [petitioner] challenged." *Id.* at 13a. In rejecting that argument, the court of appeals explained that "even a cursory glance at the phrase, in its original context, reveals that EPA was simply referring to its publication of [petitioner's] petition, rather than stipulating for the purpose of that case and this one that the agency was revisiting the rules to the extent necessary to reopen them to judicial review." *Id.* at 13a-14a. Indeed, the notice cited in the EPA's motion stated that the agency was "not proposing to adopt the explicit changes requested by [petitioner] in its petition." *Id.* at 20a.

EPA pledged to consider *whether* to reopen the rules petitioner challenged, and that pledge rendered moot petitioner's unreasonable-delay claim. The EPA's subsequent decision not to reopen the rules was entirely consistent with its previous statement. For substantially the same reason, the court of appeals' dismissal of petitioner's prior petition for review as moot did not require the court to find reopening here. In any event, petitioner's highly case-specific contentions, which turn on the language used in EPA's previous motion to dismiss and the court of appeals' understanding of its own

previous (unpublished) order granting it, raise no issue of general importance warranting this Court's review.[5]

3. Petitioner also contends (Pet. 16-25) that the court of appeals had jurisdiction over its petition for review because the petition was filed within 60 days after EPA denied the rulemaking petition. In petitioner's view, the only applicable deadline was triggered by EPA's decision in this case, and it is therefore irrelevant under 42 U.S.C. 7607(b)(1) (Supp. II 2008) when any other new "grounds" for suing arose. The court of appeals correctly rejected that contention, and its ruling does not conflict with decisions of other courts of appeals or prior decisions of the D.C. Circuit.

As the court of appeals explained, the D.C. Circuit's precedents generally allow a party to file a petition with an agency to rescind or amend an existing rule on substantive grounds and then seek judicial review if that petition is denied. Pet. App. 6a. The court further observed, however, that some judicial-review provisions specifically identify the circumstances under which challenges to rules may be brought after the original judicial-review period has expired. *Id.* at 7a. "If Congress 'directly focused on the issue,'" the court explained, "judicial review of a petition to repeal or revise rules is time-barred, except to the extent that the statute allows review based on later arising grounds." *Ibid.*

The judicial review provision at issue in this case states that a petition for review must be filed "within

[5] Petitioner suggests that the Court "should resolve the splits in authority" regarding whether a claim of unreasonable delay by EPA should be brought in the district court or in the court of appeals. Pet. 29-30. Petitioner fails to identify any such "splits." In any event, this case would be an inappropriate vehicle for resolution of that issue since the court of appeals did not address it.

sixty days" of the date the Federal Register publishes notice of the promulgation of standards or of a final action by the agency, "except that if such petition is based solely on grounds arising after such sixtieth day," then the petition "shall be filed within sixty days after such grounds arise." 42 U.S.C. 7607(b)(1) (Supp. II 2008). Section 7607(b)(1) thus expressly contemplates challenges to rules after the original 60-day period has expired, and it permits such challenges only under specified circumstances. Under the D.C. Circuit's established framework, petitioner's challenge is therefore time-barred unless it was filed within 60 days after some identified new event on which the challenge was based. See Pet. App. 8a-9a.

The legislative history of Section 7607(b)(1) reinforces the conclusion that "an undefined legitimate excuse" is not a permissible basis to "circumvent[]" "the statutory deadline (and the underlying policies of expedition and finality)" reflected in the provision. H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977) (*1977 House Report*). Instead, that history confirms Congress's "intent to strictly limit section [7607] challenges to those which are actually filed within" 60 days. *Ibid.*

> The only instance in which * * * later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

Ibid.

Even assuming that petitioner's challenge to the 1994 rules was based "solely on grounds" arising after expiration of the original 60-day period, that challenge was untimely. Pet. App. 10a. Petitioner contended below that the later arising "grounds" were the ripening of its claims, but it did not assert (let alone demonstrate) that the claims became ripe within the 60-day period before either the filing of its petition with EPA or the filing of its petition for review with the court of appeals. *Ibid.* Accordingly, petitioner did not satisfy the CAA's requirements for asserting newly-arising challenges to longstanding rules, and its petition for review was properly dismissed as untimely.

Petitioner contends that parties with claims that ripen after expiration of the original period for review must file administrative petitions with the EPA and cannot proceed directly to the court of appeals. Pet. 18-19, 20-21. This question is not presented here because the court of appeals found it unnecessary to decide it. Pet. App. 11a. Even assuming petitioner is correct that it was required to file first with the EPA, its administrative petition was untimely because it was not filed within 60 days after the ripening of its claims. *Id.* at 10a-11a.

Petitioner argues that "settled law" from the D.C. Circuit provides that its administrative petition need not have been filed within 60 days of the late-arising "grounds" for challenge, Pet. 19-20, but the decisions it cites are inapposite. Petitioner states that "*Navajo Tribe* held the Tribe could petition EPA years after its 'new information' arose." Pet. 19 (citing *Ojato Chapter of the Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975) (*Navajo Tribe*)). When *Navajo Tribe* was decided, however, the CAA did not require petitions based on later arising grounds to be filed within 60 days after

those grounds arose. Instead, the Act stated that any petition for review "shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." *Navajo Tribe*, 515 F.2d at 657 n.3 (quoting 42 U.S.C.A. 1857h-5(b) (1975 pocket part)). In 1977—after the D.C. Circuit's decision in *Navajo Tribe*—Congress amended the provision both to extend the judicial-review period to 60 days and to add the requirement that petitions "based solely on grounds" arising after expiration of the original review period must "be filed within sixty days after such grounds arise." Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(c)(3), 91 Stat. 776. The statutory language that the court of appeals found dispositive in this case thus did not exist when *Navajo Tribe* was decided.[6]

Petitioner argues that its petition was timely because it "petitioned EPA after issues arose * * * or ripened * * * and * * * sued within 60 days of EPA's final action on [the] petition." Pet. 20. That contention disregards the statutory text. The statute requires not only that a late-filed petition be "based solely on grounds arising after [the] sixtieth day," but also that the filing

[6] Petitioner's observation that the petitioner in *National Mining Ass'n* v. *Department of Interior*, 70 F.3d 1345 (D.C. Cir. 1995), petitioned the Department of Interior "well outside the 60-day window" after its grounds for challenge arose (Pet. 19-20) is inapposite for the same reason. The judicial-review provision at issue there permitted suits beyond the original 60 days for petitions "based solely on grounds arising" after the expiration of that period. Unlike the current version of 42 U.S.C. 7607(b)(1) (Supp. II 2008), however, the statute at issue in *National Mining* imposed no time limits on such actions. *National Mining Ass'n*, 70 F.3d at 1350 (quoting 30 U.S.C. 1276(a)(1) (1986)).

be made "within sixty days after *such* grounds arose." 42 U.S.C. 7607(b)(1) (Supp. II 2008) (emphasis added). Petitioner does not appear to contend that the EPA decision itself is a "ground[] arising" after the original 60-day window. *See* Pet. App. 10a (denial of petition to rescind rules "doesn't count" as later-arising ground). Instead, it points to "disparate locomotive rules, market-participant rules, Fleet Rules" and "In-Use Controls." (Pet. 20), but it makes no attempt to demonstrate that its administrative petition was filed within 60 days of the date on which *those* grounds arose.

Adopting petitioner's view of the statute would subvert Congress's intent that judicial review under the Act be "strictly limit[ed]" by the statutory deadlines. *1977 House Report* 322. Under petitioner's reading, a party with a new "ground" for challenging a longstanding rule could wait for years after that ground arose before filing an administrative petition with the EPA on that basis, and could then secure judicial review of the rule simply by filing suit within 60 days after its rulemaking petition was denied.

c. The court of appeals' interpretation of Section 7607(b)(1) does not conflict with decisions of other courts of appeals or with prior decisions of the D.C. Circuit. Petitioner contends that the decision is contrary to a decision of the Eighth Circuit (*Union Elec. Co.* v. *EPA*, 515 F.2d 206, 220 (1975)) that requires petitioners with late-arising grounds for challenging an old rule to file an administrative petition before seeking relief in court. Pet. 23; *see ibid.* ("[M]ost other circuits have also recognized the petition-reopener process under § 307(b)(1)."). As explained above, however, the court of appeals in this case did not decide whether parties with late-arising grounds for challenging longstanding rules

may file suit immediately or must first present their claims to the agency. Rather, the court declined to resolve that question because petitioner had failed to identify any triggering event for its challenge that had occurred during the 60-day period preceding either petitioner's administrative petition or its petition for review in the D.C. Circuit. See Pet. App. 9a-11a.

For similar reasons, petitioner is wrong in arguing (Pet. 30-32) that the decision below conflicts with the D.C. Circuit's prior ruling in *Navajo Tribe*. Petitioner states (Pet. 30) that, "[u]nder *Navajo Tribe*, anyone seeking judicial review outside [Section 7607(b)(1)'s] 60-day window must present their information or claims to EPA by administrative petition, seeking judicial review only after EPA denies the petition." In this case, the court of appeals acknowledged that general rule, while leaving open the question whether an exception might apply when the late-arising "ground" is the ripening of a claim. See Pet. App. 9a-11a. Moreover, as noted above, pp. 13-14, *supra*, the court in *Navajo Tribe* addressed an earlier version of the Act's judicial-review provision, which did not require that challenges based on late-arising grounds "be filed within sixty days after such grounds arise." Compare *Navajo Tribe*, 515 F.2d at 657 n.3, with 42 U.S.C. 7607(b)(1) (Supp. II 2008). That post-*Navajo Tribe* timing provision was the linchpin of the court of appeals' analysis in this case.

In any event, there is no need for this Court to police the D.C. Circuit's internal procedures for reconciling asserted conflicts between panel decisions. That court is fully capable of resolving any such disagreements through en banc consideration. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal

difficulties."). In this case, petitioner sought en banc review of the panel decision, but no judge requested a vote on the petition for rehearing. See Pet. App. 17a.

4. Petitioner contends that, even if the court of appeals did not have jurisdiction over his petition for review under 42 U.S.C. 7607(e)(1) (Supp. II 2008), it had jurisdiction under the All Writs Act, 28 U.S.C. 1651(a). Pet. 24-25. Petitioner failed to preserve that argument below, and it lacks merit in any event.

a. Other than one unexplained statement in its opening brief, see Pet. C.A. Br. 1 ("This Court has jurisdiction pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), as well as the All Writs Act, 28 U.S.C. § 1651."), petitioner did not rely on the All Writs Act below. The court of appeals did not discuss the statute. The petition for a writ of certiorari therefore does not properly present this question. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.") (citation omitted).

b. Petitioner's invocation of the All Writs Act lacks merit in any event. Petitioner contends that the statute could be used to compel EPA to provide "definitive answers to [petitioner's] substantive questions." Pet. 24. The All Writs Act does not create any such cause of action. Rather, it provides that federal courts may issue relief that is appropriate to the case before it, "contingent on that court's subject-matter jurisdiction over the case." *United States* v. *Denedo*, 129 S. Ct. 2213, 2221 (2009).

Here, the scope of the court of appeals' subject-matter jurisdiction to review EPA actions is defined by 42 U.S.C. 7607(b)(1) (Supp. II 2008). Where Congress has

specified the prerequisites for judicial review as to a particular category of cases, courts respect that choice rather than assume broader powers of review under another statute. See *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977); *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 422 (1965). The CAA's grant of jurisdiction is therefore exclusive, and petitioner is not entitled to review except in accordance with its terms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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